SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1160

DAVID FISHER,

Petitioner,

vs.

JACK L. MEDWEDEFF, TRUSTEE, ETC.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Decision to be Reviewed

This petition for a writ of certiorari requests the review of the decision and judgment of the Court of Appeals of Maryland, which became final on January 19, 1945. The title of the case is *David Fisher* v. *Jack L. Medwedeff*, Trustee in the matter of David Fisher, individually and trading as Federal Sales Company, bankrupt, and is reported in 40 Atlantic (2nd) 360.

Jurisdiction of the Supreme Court of the United States

The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code, subsection (b) (Title 28 Sec. 344 of the United States Code annotated).

Likewise a State Court has decided a Federal question of substance not heretofore determined by the Supreme Court of the United States. (Revised Rules of the Supreme Court of the United States, Rule 38, paragraph 5(a).

The Supreme Court of the United States has held that an action brought by a trustee in bankruptcy to recover asserted assets of the bankrupt estate presents a Federal question.

Rector v. *City Deposit and Bank Co.*, 200 U. S. 405, 50 L. Ed. 527, 26 S. Ct. R. 294.

Statement of the Case

The facts and proceedings which resulted in the decision for review have been stated in the petition and this statement is adopted and made part of this brief.

Specification of Errors

The Baltimore City Court, the Court of first instance, and the Court of Appeals of Maryland in affirming the judgment of the lower Court, were in error in holding that the Federal Bankruptcy Act conferred the right and power to a trustee in bankruptcy appointed under the provisions of the Act to sue the bankrupt for whose estate he was such trustee, upon a turnover order of the Bankruptcy Court, directing the bankrupt to turn over to the trustee an amount of money in cash or merchandise, in a State Court and recover a money judgment against the bankrupt.

Likewise the Baltimore City Court and the Court of Appeals of Maryland on appeal were in error in holding that a turnover order of a Bankruptcy Court was a judgment or decree of that Court upon which the trustee in bankruptcy could sue the bankrupt for whose estate he was such trustee, and that the turnover order created a contractual

obligation on the part of the bankrupt to the trustee upon which contractual obligation a suit could be brought and a money judgment recovered.

Argument

The petitioner contends that the primary source of the power granted to a trustee in bankruptcy to prosecute or defend proceedings at law or in equity is found ir Section 46 of the Bankruptcy Act, heretofore quoted in full in the petition on page 9.

This statute grants to the trustee in bankruptcy the power to bring or prosecute *only* those suits which the bankrupt might have brought or prosecuted if the bankruptcy proceedings had not been instituted. In other words, the trustee in bankruptcy stands in the place of the bankrupt for the purpose of bringing or prosecuting suits concerning the property acquired or claimed by the trustee and the trustee has power to proceed to the same extent as though the bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants. Therefore, since it is inconceivable that the bankrupt would sue or proceed against himself, the trustee in bankruptcy has no right or power to sue or proceed against the bankrupt. Sub-section (a) of Section 46 specifically refers to suits by the trustee against third parties who are adverse claimants to the property belonging to the bankrupt estate. Sub-section (b) of Section 46 refers to the Courts in which suit may be brought by the trustee, not with the intent to create any new right of action in the trustee in bankruptcy but that the trustee in bankruptcy shall not bring suit in any jurisdiction by virtue of his appointment by a Federal Court, in which the bankrupt could not have brought suit against any adverse claimant, had not bankruptcy intervened. And, likewise, this section of the Statute is intended to give the trustee the right to

sue in the State Courts instead of being limited to proceeding only in the Federal Court by virtue of the appointment by such Court.

By the provisions of Section 110 of the Bankruptcy Act, the title to all property belonging to the bankrupt or which the bankrupt transferred in fraud of his creditors, is vested by operation of law in the trustee in bankruptcy. The pertinent portions of this section have been quoted in the petition.

By this section the title to all the assets of the bankrupt is, by operation of law, vested in the trustee, and where the bankrupt has made any transfer of his assets or incurred an obligation which would be fradulent as to his creditors, the trustee in bankruptcy, having title thereto, may recover such assets or avoid such obligation or transfer, not against the bankrupt, but against the third parties, as adverse claimants, to whom such property has been so fraudulently transferred or obligation incurred. This requires a proceeding against third parties holding the property or the obligation, in which proceedings the trustee proceeds to recover property to which he holds title, but in no instance would the proceedings be against the bankrupt.

And further, Sections 96 and 107 of the Bankruptcy Act give the trustee in bankruptcy the power to avoid preferences, and liens obtained or transfers made within four months prior to the adjudication in bankruptcy.

It is for the purpose of enforcing these rights against third parties that the power to proceed therefor is granted to the trustee by Sections 46 and 110, and in all such proceedings the defendants are the third parties and not the bankrupt, who is by operation of law divested of all title to his property.

As against the bankrupt special proceedings are available for the recovery of property and assets wrongfully

withheld by the bankrupt from the trustee to which the trustee holds title by operation of law. These special proceedings consist of the power of the Bankruptcy Court to order the bankrupt to turn over any concealed assets or other assets presumed to be in his possession, and failure to comply results in denial of discharge, and, if the trustee can prove that the bankrupt is able to comply with the turnover order but refuses, punishment by fine or imprisonment or both for contempt. If the trustee cannot prove the bankrupt is able to comply, the contempt proceedings must be dismissed. Such was the situation in the present case as is shown by the declaration of the trustee.

Section 2, Bankruptcy Act.
Section 14, Bankruptcy Act.

An exhaustive examination of the decisions of the Courts of the United States fails to reveal any case in which the trustee in bankruptcy sued the bankrupt for whose estate he was acting as such trustee and recovered a money judgment.

Illustrative of cases construing the intent and meaning of Section 46 of the Bankruptcy Act, the following decisions of United States Courts are submitted:

In the case of *Viquesney* v. *Allen*, (C. C. A. 4) 131 Fed. 21, 12 Am. B. 402, it was held that the provisions of clause (a) of Section 46 relate only to controversies between the trustee in bankruptcy and adverse claimants and clause (b) relates only to the suits brought by trustees in bankruptcy, and neither clause authorizes suits by simple contract creditors to set aside fradulent conveyances of the bankrupt.

In the case of *Lehman* v. *Crosby* (D. C.—N. Y.), 99 Fed. 542; 3 Am. B, 662, it was held that the provisions of clause (b) of Section 46, apply only to such actions as the bankrupt himself could have brought before bankruptcy and do

not deprive the District Court of jurisdiction of suit by a trustee to recover the proceeds of an alleged fradulent transfer by the bankrupt.

In the case of *In re. Newfoundland Syndicate* (D. C.—N. J.) 196 Fed. 443, 28 Am. B. 119, it is stated that the limitation of this subsection (b) is upon the Court, and the suit referred to is a proceeding which contemplates the bringing in of a party respondent.

One decision of a State Court apparently holds the same as the Court of Appeals of Maryland and is found in the case of *Sampsell* v. *Gittleman*, 130 Pac. (2d) 486, decided by the District Court of Appeals of California, Section District, Division 2, 1942, and the case herein requested to be reviewed was patterned directly upon the California case.

The petitioner contends that the decisions of both the California and Maryland Courts were predicated upon an erroneous interpretation and construction of Section 46 of the Bankruptcy Act. This is illustrated by the following comparison;

The California Court says and the Maryland Court apparently follows; that by Section 46 of the Bankruptcy Act, the trustee of a bankrupt's estate is authorized to prosecute *any* action in the Court where the bankrupt might have brought an action had there been no proceedings under the Bankruptcy Act. Whereas the Statute states, subsection (b) "Suits by the receiver and the trustee shall be brought or prosecuted only in the Courts where the bankrupt might have brought or prosecuted them if proceedings under this title had not been instituted, unless by consent of the defendant."

It is contended that there is a marked distinction between the right and power of the trustee as the title holder to property, to proceed against the bankrupt to secure the specific property which it is definitely known is in the pos-

session or under the control of the bankrupt, if such right and power exists, which is doubted, and a proceeding at law by the trustee to recover a money judgment against the bankrupt for failure to have on hand and capable of delivery to the trustee an amount of goods which, in the opinion of the referee or the Court, he ought to have on hand. If the latter proceeding were sanctioned, wherever a person became insolvent and could give no satisfactory explanation why he was so insolvent, the trustee in bankruptcy could sue the bankrupt and obtain a money judgment for such deficiency. The decision of the Bankrupt Court in the present case shows that the bankrupt did not have the property and was not able to comply with the turnover order, and it is respectfully submitted the intent of the Bankruptcy Statutes was not to create a cause of action in the trustee in bankrupcy against the bankrupt because there existed a deficiency in assets. It is because there is always a deficiency in assets that bankruptcy occurs, if there were no deficiency in assets, there would be no bankruptcy.

It has been held that a turnover order is not a judgment. *In re Schleisinger,* 102 Fed. 117.

In the case of *Oriel* v. *Russell* (1929) 278 U. S. 358, 73 L. Ed. 419, the bankrupts had been committed for failure to turn over their books of account. In reviewing the case on appeal to this Court, the late Mr. Chief Justice Taft in the course of delivering the opinion stated:

"We find ourselves in general accord on the subject with the remarks of the late Circuit Judge McPherson, who used the following language in the case of Epstein vs. Steinfeld, 206 Fed. 568, reargued in 210 Fed. 236;

" 'In the case at hand the consequence is that as the Order to pay or deliver stands without sufficient reply it remains what it had been from the first, an order presumed

to be right and therefore an order that ought to be enforced. In the pending case or in any other the Court may believe the bankrupt's assertion that he is not in possession or control of the money or the goods, and in that event the civil inquiry is at an end.' "

The opinion then states that if the bankrupt is not believed, he can be restrained of his liberty, actual or virtual imprisonment for debt has ceased, the bankrupt can be imprisoned to compel obedience.

Therefore, in applying the above statement where the Bankrupt Court believed that the bankrupt was not in possession of the goods or the money and could not comply with the turnover order and therefore dismissed the contempt, the civil matter is at an end. And the plain reason that it is at an end is that by judicial decision the bankrupt has not property in his possession the title to which is vested by operation of law in the trustee. A suit in the form of damages for failure to deliver what the referee, the trustee, or even the Court think the bankrupt ought to have in his possession but does not have, would be the creation by the Bankruptcy Act of a right of action which never existed. This is clearly not the intention of the Bankruptcy Act.

The granting of the Writ of Certiorari in this case is respectfully requested.

LEONARD WEINBERG,
J. PAUL SCHMIDT,
For Weinberg & Green,
Attorneys for Petitioner,
3300 O'Sullivan Building,
Baltimore 2, Maryland.